No. 96-1517

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; and HILDA FIDEL,

Petitioners,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE, CLEMENS, GLASSMAN & CLEMENS, STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON, MELVIN SPITZ, BERNICE HUTTER, RAFAEL E. VEGA, HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT STULL, STULL & BRODY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' diversity action based solely upon state law claims was barred by the applicable state statutes of limitations?[1]

2. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' state law claims collaterally attacking a class action settlement approved by the District Court are barred by the "litigation privilege" established by California Civil Code § 47(b)?

3. Did the Ninth Circuit Court of Appeals correctly hold that a party may not be granted leave to amend a complaint where the record demonstrates that an amendment would have been futile?[2]

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1. Question 1 has been fully discussed in the Brief in Opposition filed by Gibson, Dunn & Crutcher LLP and Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy and Robert R. Sprague. Respondent Stull, Stull & Brody joins in that brief on Question 1.

2. The petition raises but does not address Question 3. Since any amendment would have been futile, the District Court's order was correct. *DeSoto v. Yellow Freight Systems, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

LIST OF INTERESTED PARTIES

The petitioners are David Fidel, Marit Fidel, Erik Fidel and Hilda Fidel.

The respondents are correctly identified in the caption. Howard Wollitz of Charlston, Revich & Williams LLP is counsel of record for respondent Stull, Stull & Brody.

This brief in opposition is filed on behalf of Stull, Stull & Brody.

Respondent requests that this Court deny the petition for writ of certiorari which seeks review of the Ninth Circuit Court of Appeals' unpublished Memorandum, filed December 19, 1996. Appendix A to the petition.

STATEMENT OF JURISDICTION

The date on which the Court of Appeals issued its decision and the date on which judgment was entered by the Court was incorrectly identified by petitioners as September 19, 1996. Judgment was in fact entered on December 19, 1996.

STATUTORY PROVISIONS INVOLVED

The petition incorrectly identifies Federal Rule of Evidence 504 as implicated by this appeal. The Federal Rule of Evidence which is purportedly implicated by this appeal is FRE 501 which was cited in the petition as FRE 504.

COUNTERSTATEMENT OF THE CASE

There is no reason for this Court to review the Ninth Circuit Court of Appeals' unpublished Memorandum which was limited to issues of state law.

A. Correction of Misstatements in the Petition

The opinion of the Court of Appeals correctly sets forth the facts of this case. Respondent respectfully directs this Court's attention to the Court of Appeals' Memorandum.[3]

Pursuant to United States Supreme Court Rule 15.1,

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3. In addition, the facts are more fully set forth in the brief in opposition filed by GDC and the Officer/Director Respondents.

respondent brings the following misstatement of fact contained in the petition to the Court's attention.

Petitioner repeatedly misrepresents to this Court the existence of insurance "available" to settle the claims of the class action plaintiffs in the *Gibraltar* class action. Petition at 8, 10-11, 12, 19. In fact, the excess layer was not available to satisfy any settlement claims. Appendix A at 4a, note 4.

REASONS FOR DENYING THE WRIT

The interpretation of California Civil Code § 47(b) is a question of state law. Contrary to attempts in the petition to frame the issue otherwise, the application of § 47(b) in this case does not invoke Rule 23 of the Federal Rules of Civil Procedure or the Due Process Clause of the United States Constitution. Respondent suggests that attempts to implicate the Federal Rules of Civil Procedure and the Constitution should be rejected as without legal or factual basis.

This Court rarely grants a petition for writ of certiorari when the asserted error involves factual findings or the misapplication of a properly stated rule of law. United States Supreme Court Rule 10. *See also Haring v. Prosise*, 462 U.S. 306, 314 n. 8, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) ("Standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"). *Accord Burks v. Lasker*, 441 U.S. 471, 486 (1979) ("We did not grant certiorari to decide a question of state law"); *Pierson v. Ray*, 386 U.S. 547, 558 n. 12 (1967) ("We do not ordinarily review the holding of the Court of Appeals on a matter of state law and find no reason for departing from that tradition in this case.").

Accordingly, there is no reason for this Court to grant review

of the unpublished Memorandum Decision of the Court of Appeals which was based solely upon the interpretation of California state law.

The application of § 47(b) in this case was unquestionably a matter of state law. The Court of Appeals upheld dismissal of the claims based upon a proper statement of the law in California that § 47(b) creates a privilege for publications made in any judicial proceeding. Appendix A at 14a.

The privilege provided by § 47(b) encompasses any communications (1) made in a judicial or quasi-judicial proceeding; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; (4) that have some connection or logical relation to the action. *Silberg v. Anderson,* 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638 (1990). Pursuant to Federal Rule of Evidence 501, state law privileges raised in the context of a defense to state law claims are recognized in federal court. As such, § 47(b) was applicable in the diversity action that gave rise to this appeal.[4]

The Court of Appeals also properly examined the exception to the § 47(b) privilege where a judgment has been obtained by extrinsic "fraud" and the "aggrieved party [has been] deliberately kept in ignorance of the action or proceeding, or in some other way been fraudulently prevented from presented its claim or defense." *Moore v. Conliffe* (1994) 7 Cal. 4th 634, 643 n. 5, 29 Cal. Rptr. 2d 152, 157 n. 5. Appendix A at 15a.

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4. In 1994, after all relevant events in the underlying case, § 47(b) was amended without express retroactive effect to exclude from the protection of the statute judgments obtained by the concealment of the existence of an insurance policy or policies. *See* 1994 Cal. Legis. Serv. ch. 700, § 2 (West) (S.B. 1457). That amendment has no application here as no part of the California Civil Code is retroactive "unless expressly so declared." (Cal. Civil Code § 3 (West 1996))

The Court of Appeals concluded that the circumstances of this case did not warrant the disturbance of a final judgment ordinarily protected by § 47(b) because the appellants participated in the Rule 23 class action by filing claims and the alleged "misrepresentations" made to the appellants were in the notices approved by the District Court. The Court of Appeals concluded that "the fraud alleged is not extrinsic to the final judgment which is challenged and no actionable statement extrinsic to the proceeding could defeat the § 47(b) privilege." Appendix A at 16a.

Petitioners are simply wrong in their assertion that the purposes and objectives of FRCP Rule 23 will be entirely frustrated if California's litigation privilege is held applicable in this case. In fact, that assertion is absurd since in this Rule 23 class action, additional procedural safeguards, such as court approval of the class settlement, were in place to protect the class members in the course of settlement. The Court of Appeals recognized that the notices of which the petitioners complain were approved by the District Court. Appendix A at 15a.

Also without merit is the argument that the application of the California litigation privilege would be inconsistent with Section 10(b) of the Securities Exchange Act of 1934. Petition at 23-24. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder provide redress for false or misleading statements made in connection with the sale of securities. Section 47(b) does not purport to make privileged any false or misleading statement made in connection with the sale of securities. Only statements made in subsequent litigation are privileged, as in this case. There simply is no conflict between § 47(b) and federal law.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals affirming dismissal of Petitioners' state law claims is not appropriate for review by this Court. No compelling reason exists for the exercise of the Court's discretionary jurisdiction and the writ of certiorari should be denied.

Respectfully submitted,

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